

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 27, 2007

ROBERT WAYNE MARLER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Sullivan County
No. C50,446 R. Jerry Beck, Judge

No. E2007-00422-CCA-R3-PC - Filed May 1, 2008

The petitioner, Robert Wayne Marler, appeals as of right the Sullivan County Criminal Court's denial of his petition for post-conviction relief. The timely-filed petition includes several allegations regarding the ineffective assistance of counsel. After the appointment of counsel and a full evidentiary hearing, the post-conviction court found that the petitioner failed to establish his grounds for post-conviction relief by clear and convincing proof and denied relief. On appeal, the petitioner contends that the post-conviction court erred in finding that trial counsel was not ineffective in: (1) investigating and presenting alibi witnesses, (2) failing to request a continuance when a material witness failed to appear for court and (3) failing to adequately impeach witnesses. Following our review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Raymond C. Conkin, Jr., Kingsport, Tennessee, attorney for appellant, Robert Wayne Marler.

Robert E. Cooper, Jr., Attorney General & Reporter; Sophia S. Lee, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and James F. Goodwin, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The petitioner was convicted by a Sullivan County jury of reckless homicide and especially aggravated robbery. The trial court imposed an effective sentence of twenty-five years for the offenses. The petitioner's convictions and sentences were affirmed by this court on direct appeal. State v. Robert Wayne Marler, a.k.a. Bobby Marler, No. E2003-02179-CCA-R3-CD, 2004 WL 1562529 (Tenn. Crim. App. July 12, 2004), perm. app. denied (Tenn. Nov. 15, 2004). As relevant to this post-conviction petition, the facts at trial showed that the petitioner and Daniel McGuire went to the camper of the victim, Thomas Joe Williamson. McGuire testified that the petitioner told him

that the victim was his uncle. After visiting for some time, the petitioner suddenly pulled out a knife and stabbed the victim repeatedly. After the stabbing, the two men left the camper with the petitioner taking a bag of change and other items stuffed in a pillowcase. McGuire testified that the petitioner told him a few weeks after the incident that he had expected the victim to have a lot of money in his wallet when he stabbed and robbed him. McGuire also indicated that the petitioner warned him not to talk to anyone about the incident. McGuire later assisted authorities in recovering several items that the petitioner had thrown into a river. McGuire claimed not to have received any proceeds from the robbery and, at the time of trial, had not been charged with any offenses in relation to the victim's robbery and death. Vicky Motoya testified to the petitioner's unusual spending habits immediately after the victim's death and that she witnessed the petitioner throw an unfamiliar wallet into a river several days after the incident. She spoke to authorities when she realized the wallet's significance after learning that authorities had found the victim's wallet near the river. Other witnesses testified that the petitioner had confessed his culpability to them. The petitioner testified at trial and denied all involvement in the incident.

At the post-conviction evidentiary hearing, the petitioner testified that several neighbors, David and Sharri White, Andrew Holmes, and David and Caroline Dishner, would have provided alibi evidence at trial had trial counsel presented them as witnesses. The petitioner testified that he gave trial counsel the names of the witnesses but that trial counsel failed to interview any of them except Holmes. He recalled asking trial counsel about the witnesses and being told by trial counsel that the testimony of those witnesses "[w]ouldn't make any difference." The petitioner also claimed that trial counsel failed to present character witnesses on his behalf.

The petitioner testified that trial counsel failed to secure the attendance of Amy Snodgrass who would have testified that McGuire had a lot of the stolen items in his possession immediately after the incident and that McGuire admitted his participation in the robbery and homicide. The petitioner acknowledged that Snodgrass' statement to the police indicated that the petitioner was the person who stabbed the victim, contrary to his testimony at trial that he was not even present at the incident.

Larry Scott Johnson testified at the evidentiary hearing that he knew the petitioner as someone who lived at or stayed with another resident at his apartment complex. Johnson testified that he had a conversation with McGuire's sister, Danielle Higgins, who told him that she gave a statement implicating the petitioner because "she would rather tell on somebody she didn't know than tell on somebody she was kin to" and she was interested in the reward money.

Trial counsel testified that he met with the petitioner "[e]nough to prepare for the case." He recalled the list of alibi witnesses that the petitioner had urged him to find but stated that with only their names, it was difficult to locate anyone. He testified that one potential alibi witness, Andrew Holmes, came to his office but the information he provided did not support an alibi defense. He admitted that he made a mistake when he announced he was ready for trial without first checking on the presence of his subpoenaed witnesses, specifically Snodgrass. He further related that Snodgrass' statement "was a double-edged sword." Trial counsel also testified that the petitioner

decided to move forward with trial in Snodgrass' absence. Trial counsel generally denied that he was ineffective in cross-examining witnesses, pointing out that the petitioner was originally indicted for first degree murder but convicted of reckless homicide.

ANALYSIS

The burden of proof in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-372, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

The post-conviction court found that trial counsel had adequately and vigorously cross-examined the witnesses at trial. The court also found that the petitioner's allegation regarding trial counsel's failure to seek a continuance due to Snodgrass' absence did not amount to deficient performance because Snodgrass' statement to the police, while differing in the degree of McGuire's

involvement in the offenses, still placed the petitioner at the scene as the person who stabbed the victim. In light of the petitioner's testimony that he was not present at the scene, the post-conviction court found that the petitioner failed to establish this ineffective assistance of counsel claim. Regarding trial counsel's alleged failure to investigate an alibi defense, the post-conviction court found that trial counsel had done "all he could under the circumstances" in light of the difficulty of determining a time of death and the transiency of the witnesses. The post-conviction court similarly found that while trial counsel could have cross-examined some of the witnesses differently, nothing alleged by the petitioner regarding cross-examination appeared to be "one of those devastating things that would just [say] that guy's not guilty."

We note that the petitioner failed to present any proof regarding alibi witnesses other than his own assertions at the evidentiary hearing. Trial counsel testified that he diligently sought the alibi witnesses but none could be found except Holmes who, once interviewed, could not establish an alibi for the petitioner. We also agree with the post-conviction court's assessment of Snodgrass' statement, which was made an exhibit at the evidentiary hearing. While the statement contains differences relative to McGuire's participation in the offenses, it in no way exculpates the petitioner. Therefore, we conclude that the proof does not show that the outcome of the trial would have been different had Snodgrass testified. Furthermore, we conclude that the proof of the petitioner's allegation regarding trial counsel's deficient cross-examination of witnesses is not sufficient to undermine the confidence in the outcome of the trial. For these reasons, we cannot conclude that the evidence in this record preponderates against the post-conviction court's findings. Therefore, the judgment of the post-conviction court denying the petition for post-conviction relief is affirmed.

CONCLUSION

The evidence does not preponderate against the findings of the post-conviction court that the petitioner failed to establish his grounds for relief by clear and convincing proof. The denial of the post-conviction relief petition is affirmed.

D. KELLY THOMAS, JR., JUDGE